IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, *et al.*,

Petitioners,

—v.—

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, and ACLU OF NORTHERN CALIFORNIA, *AMICI CURIAE*

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INTEREST OF THE AMICI*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Southern California and the ACLU of Northern California are regional affiliates of the American Civil Liberties Union.

For nearly a decade, the governing bodies of the ACLU have vigorously debated the equal protection principles underlying "color blind" and "gender blind" standards, on one hand, and race and gender conscious affirmative action, on the other. After each debate, the ACLU has reaffirmed its commitment to the need for eradicating the cumulative effects of societal discrimination against minorities and women through the use of race and gender conscious affirmative action.

The most recently amended ACLU policy on this issue recognizes at the outset that "every individual should enjoy equal access to employment opportunities and to the means of self-advancement without invidious discrimination." The policy also recognizes, in view of this

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

nation's history of discrimination, that race and gender conscious affirmative action is not invidious discrimination:

> However, when discrimination -- and particularly discrimination in employment and education -- has been long and widely practiced against particular groups, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind,' or 'sex-blind' standards for selection, promotion, or retention of the applicants and candidates for available jobs or educational programs. Equal treatment in a context of unequal circumstances serves only to perpetuate inequity, and compensatory justice may therefore be essential to achieving equal justice....
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> * * *
>
> We reaffirm the continuing need for vigorous efforts to redress the adverse effects of racism and sexism and other forms of invidious discrimination in American society....
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> * * *
>
> We also support the voluntary use of numerical remedies* when there is a reasonable basis for a determination that such remedies are reasonable in

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* ACLU policy defines "numerical remedies," as "the adoption of a number which an employer, school, etc., commits itself to meet, and must meet unless it demonstrates that it could not meet the number through all reasonable good faith efforts to do so."

> relation to the problem of current disadvantage caused by discrimination, whether specific or societal.
>
> * * *
>
> When numerical remedies are used, the standard for inclusion of members of the affected group in the eligible pool should be the capacity to perform at a level of basic competence. Such qualified members of the affected group should then be admitted or hired in preference to other applicants of the group that has benefitted from previous preference and who may be higher on whatever ranking system is otherwise being used. We recognize that individuals from previously preferred groups may lose that advantage, thus excluding individuals otherwise qualified. This is inevitable in any serious effort to redress grievous past injustice.
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> * * *
>
> A finding of discrimination in an individual or particular institution need not be required because the society's discrimination has, historically, been intensive, pervasive, and continuous....

Pursuant to earlier ACLU policies to this same effect, the ACLU, amicus curiae, filed briefs in this Court supporting the constitutionality and legality of the race conscious, sixteen percent set aside special admissions program at issue in Regents of the University of California v. Bakke, 438 U.S. 265 (1978); supporting the legality of the race conscious

one-to-one training and employment plan upheld in United Steelworkers of America v. Weber, 443 U.S. 193 (1979); and supporting the constitutionality of the Public Works Employment Act's race conscious ten percent set aside upheld in Fullilove v. Klutznick, 65 L. Ed.2d 902 (1980).

Because of our policies, and because we believe that the race and gender conscious plan at issue in the instant case is lawful and constitutional under this Court's teachings in Bakke, Weber and Fullilove, we urge this Court to affirm the decision of the California Court of Appeals and to uphold this race and gender conscious plan.

SUMMARY OF ARGUMENT

This Court's decisions in Bakke, Weber, and Fullilove establish the validity of Respondents' race and gender conscious affirmative action plan under Title VII and under the Fourteenth Amendment.

The legality of this plan under Title VII is established by this Court's decision in Weber, and by the legislative history of the 1972 amendments to Title VII. This legislative history, which was not addressed in Weber, conclusively reveals Congress' intent in favor of race and gender conscious numerical measures.

Respondents' plan is constitutional under the Fourteenth Amendment because it meets the "substantial relationship" test applied in Bakke by Justices Brennan, White, Marshall and Blackmun, as well as the "close examination" test applied in Fullilove by Chief Justice Burger. Even the "strict scrutiny" standard applied to remedial classifications by Justice Powell is satisfied here, as Respondents' plan is premised on extensive legislative and administrative identifications of past discrimination.

ARGUMENT

I. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN IS LAWFUL UNDER TITLE VII

A. This Court's Decision in Weber Conclusively Establishes the Legality of this Race and Gender Conscious Plan

In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), this Court held that the affirmative action plan at issue there -- a plan which set a minority employment goal of 39% based on labor market statistics, which was implemented by a one-to-one hiring ratio, and which was expected to be in place well past the year 2000 -- "falls on the permissible side of the line" and thus was lawful under Title VII. 443 U.S. at 208. A fortiori, the affirmative

action plan at issue here -- a plan which sets employment goals based on labor market and inmate statistics, which is implemented only by good faith efforts to meet the goals, and which is of limited duration of only five years -- also falls on the permissible side of the line and hence is lawful.

Apart from the obvious differences in the goals, implementation and duration, there are only two pertinent differences between the plan at issue here and the one approved in Weber. First, this plan establishes employment goals for women not just for imnorities. Second, the plan was adopted by a governmental employer not a private employer. That these differences are without any legal significance was established in Dothard v. Rawlinson, 433 U.S. 321 (1977), where this Court expressly applied general Title VII principles to a case involving gender discrimination and further held that Congress intended "Title VII principles to be applied to governmental and private employers alike." 433 U.S. at 331 n.14.[1/] In

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[1/] The suggestion in the Brief for Petitioners at p.34 that the standards governing unlawful discrimination under Title VII are different for public as opposed to private entities finds no support in Title VII's legislative history; was rejected by this Court in Dothard v. Rawlinson, 433 U.S. 321 (1977); and has been

[footnote continued on page 7]

short, the plan at issue here is lawful for precisely the same reasons that this Court approved the plan in Weber.

B. The 1972 Amendments to Title VII Further Establish the Legality of this Affirmative Action Plan

Although this Court in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), based its decision on the original 1964 legislative history of Title VII, the Weber decision is even more conclusively supported by the legislative history of the 1972 amendments to Title VII. This more recent legislative history similarly establishes the legality of the affirmative action plan here.

As this Court pointed out in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), the "dominant Title VII battle in the 92nd Congress was over what kind of additional enforcement power should be granted to the EEOC." 432 U.S. at 361. Since part of

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[footnote continued from previous page]

rejected by every court of appeals that has faced the issue, e.g., United States v. Virginia, 620 F.2d 1018 (4th Cir. 1980); Scott v. Anniston, 597 F.2d 897 (5th Cir. 1979); Blake v. Los Angeles, 595 F.2d 1367 (9th Cir. 1979); United States v. Chicago, 573 F.2d 446 (7th Cir. 1978); Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir.), cert. denied, 434 U.S. 819 (1977).

that battle concerned the potential transfer of Executive Order 11246 enforcement powers to the EEOC, there was considerable debate on the appropriateness of race and gender conscious numerical measures. Both in the House,[2/] and primarily in the Senate, the use of such measures was approved.

Debate in the Senate focused on two amendments proposed by Senator Ervin. The first amendment barred the use of "fixed or variable numbers, proportions, percentages, quotas, goals, or ranges" based on race or sex. 118 Cong. Rec. 1662 (1972). In Senator Ervin's words, his proposed amendment "forbids discrimination in reverse." 118 Cong. Rec. 1663 (1972).

Among the opponents of Senator Ervin's first amendment was Senator Javits, who spoke at length in favor of race and gender conscious numerical measures. 118 Cong. Rec. 1664-1676 (1972). In support of his position, Senator Javits spoke approvingly of the

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[2/] Debate in the House centered on an amendment, offered by Representative Dent, which would have prohibited the use of quotas or preferential treatment. 117 Cong. Rec. 31784, 31975-31981, 31984 (1971). A substitute amendment directly opposing the Dent amendment was adopted by the House. 117 Cong. Rec. 32089, 32111-32112 (1971).

numerical measures upheld in Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and in United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), see 118 Cong. Rec. 1664-1665 (1972), and inserted into the Congressional Record copies of the courts of appeals' decisions in those cases, see 118 Cong. Rec. 1665-1675 (1972). Significantly, Senator Javits also spoke approvingly of the use of numerical hiring measures adopted voluntarily by employers in consent decrees, see 118 Cong. Rec. 1675 (1972), and inserted into the Congressional Record a copy of a report summarizing two voluntarily adopted numerical measures, see 118 Cong. Rec. 1675-1676 (1972). On a vote of 22 yeas, 44 nays, 34 not voting, the first Ervin amendment was defeated. 118 Cong. Rec. 1676 (1972).

Undaunted, Senator Ervin next introduced a similar amendment. 118 Cong. Rec. 4917-4918 (1972). Senator Javits objected to the amendment on the grounds that the Senate had already decided the issue: "we voted on that here; we debated it and we decided it." 118 Cong. Rec. 4918 (1972). In response, Senator Ervin admitted that the "same question is

involved." 118 Cong. Rec. 4918 (1972). Nonetheless, Senator Ervin added: "I sincerely hope that the Senate will agree to the amendment." 118 Cong. Rec. 4917 (1972). It did not. Senator Ervin's second amendment was defeated even more convincingly than his first amendment: 30 yeas, 60 nays, 10 not voting. 118 Cong. Rec. 4918 (1972).

II. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN IS CONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT

A. The Affirmative Action Plan Satisfies the Substantial Relationship Test, for the Plan Remedies Past Societal Discrimination Against Minorities and Women

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four of the five members of this Court who addressed the constitutional issue -- Justices Brennan, White, Marshall and Blackmun -- upheld the rigid sixteen percent set aside for minority applicants because it fulfilled the "articulated purpose of remedying the effects of past societal discrimination," the effects of which were manifested in substantial and chronic minority underrepresentation. 438 U.S. at 362. That articulated purpose, the four Justices held, satisfied the substantial relationship

test -- which the Court "developed in gender-discrimination cases" and which also is applicable to remedial racial classifications -- as it served "important governmental objectives" and was "substantially related to those objectives." 438 U.S. at 359, quoting from Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976).

Although no fifth member of this Court has yet precisely held that the substantial relationship test is applicable to remedial racial classifications, Chief Justice Burger in his plurality opinion in Fullilove v. Klutznick, 65 L. Ed.2d 902 (1980), declined to apply the more stringent strict scrutiny standard which can be satisfied only by a compelling state interest. Instead, the Chief Justice held that a remedial racial classification only "calls for close examination," 65 L. Ed.2d at 920, a standard not unlike that adopted by Justices Brennan, White, Marshall and Blackmun in Bakke.[3/]

[3/] Although Justice Powell joined in the Chief Justice's plurality opinion in Fullilove, he nevertheless disassociated himself from the "close examination" standard of review adopted by the Chief Justice. In a separate concurring opinion, Justice Powell restated his position in Bakke: a remedial racial classification "is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest." 65 L. Ed.2d at 935.

Not only is the substantial relationship test appropriate here, but the race and gender conscious goals at issue unquestionably satisfy that test. First, at this stage of constitutional history, there is no question that the substantial relationship test applies to a gender conscious remedial classification.[4/] For the reasons stated by Justice Brennan in Bakke, the same standard must govern the race conscious goals at issue here.[5/]

[4/] Amici do not suggest that the substantial relationship test should be applied to gender discrimination, for we have consistently urged this Court to recognize that practices which discriminate against women should be governed by the strict scrutiny standard of review. See Frontiero v. Richardson, 411 U.S. 677 (1973). Although we continue to assert this proposition, we recognize that our view has not yet been adopted by more than four members of this Court, id., and that the Court has apparently settled on the lesser, substantial relationship standard of review for the time being. Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976).

[5/] This is particularly appropriate in an employment setting where this Court has already recognized that "classifications based on gender, not unlike those based on race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

Second, since the rigid set asides in Bakke and Fullilove were found to satisfy the substantial relationship test -- or the "close examination" test -- the more lenient, good faith goals at issue here a fortiori satisfy those tests. They too serve the important governmental objectives of remedying the effects of past societal discrimination, and are substantially related to accomplishing those objectives.

B. The Affirmative Action Plan Satisfies the Compelling State Interest Test, for it Remedies Identified Past Discrimination

Not only do the race and gender conscious goals satisfy the substantial relationship test but they also satisfy the compelling state interest test deemed applicable to remedial racial classifications by Justice Powell both in Regents of the University of California v. Bakke, 438 U.S. 265, 287-315 (1978), and in Fullilove v. Klutznick, 65 L. Ed.2d 902, 935-947 (1980).

Satisfaction of this strict scrutiny test, Justice Powell held in both cases, occurs where the remedial racial classification is premised upon legislatively or administratively

identified past discrimination.[6/] When such an identification is made, a responsive remedial classification is constitutional -- as Justice Powell held in Fullilove -- because governments have an undeniable and overriding "interest in ameliorating the disabling effects of identified discrimination." 65 L. Ed.2d at 936.

6/ The identification in fact need not be of past discrimination but instead may be only of underrepresentation. This point was illustrated in Bakke by Justice Powell's approval of South Carolina v. Katzenbach, 383 U.S. 301 (1966), upholding a remedial racial classification premised only on scant legislative references to electorate underrepresentation of minorities; and by Justice Powell's similar approval of Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), both upholding remedial racial classifications premised only on administrative identifications of minority underrepresentation in the skilled building trades. See 438 U.S. at 301-302, 301 n.41.

Better illustrating this point is Justice Powell's opinion in Fullilove in which he upheld the ten percent set aside for minority contractors premised almost exclusively on several federal agency reports and one congressional committee report indicating underrepresentation in government contracting of minority contractors. See 65 L. Ed.2d 939-942.

The remedial classifications at issue here are premised on legislatively and administratively identified past discrimination similar to yet even stronger than the identifications relied on in Fullilove. As is set forth at some length in the Brief for Respondents, identifications of severe underrepresentation and past discrimination supporting the remedial classifications here were made by Congress in 1972 when it amended Title VII to cover state and local governments, by Congress in 1973 and again in 1976 when it amended and strengthened the Crime Control Act's nondiscrimination provisions, by the U.S. Commission on Civil Rights prior thereto in 1969 and 1970, by the California Assembly in 1971 and by the California Legislature in 1972 and 1977, by the Governor of California in 1971 and 1974, and frequently by the Respondent California Department of Corrections itself. In fact, as also is explained in the Brief for Respondents, the Respondents in the trial court below sought to concede and document their own past discrimination.

The identifications here -- indeed, the findings and attempted admissions here -- are more than adequate to support the good faith goals adopted by the Respondents in pursuit of

the constitutionally permissible objective of ameliorating the disabling effects of identified discrimination.

CONCLUSION

Since Respondents' remedial affirmative action plan is both lawful under Title VII and constitutional under the Fourteen Amendment, the decision of the California Court of Appeals should be affirmed.

Dated: October 17, 1980

Respectively submitted,

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